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IN THE

Supreme Court of the United States

DYSTAR TEXTILFARBEN GMBH & CO.
DEUTSCHLAND KG

Petitioner,

v.

C.H. PATRICK CO., AND BANN QUIMICA LTDA,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

REPLY FOR WRIT OF CERTIORARI

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DyStar submits this reply to the Brief in Opposition filed by C.H. Patrick, Co. and Bann Quimica, Ltda. ("Bann"). Bann's opposition re-argues the facts of the case and contends that the Federal Circuit properly overruled the jury verdict. Not only is Bann wrong, but Bann never addresses numerous issues raised in the petition. For example, Bann does not mention the Federal Circuit's lack of proper deference to jury verdicts. Further, instead of addressing the new corroboration requirement and new capability standard that ignores secondary considerations, Bann simply wishes them away.[1] Thus, this case is about much more than whether the Federal Circuit properly granted JMOL, and the Court should grant certiorari.[2]

I. JMOL

The jury held that Bann failed to meet its burden of proving by clear and convincing evidence that the asserted claims of the '992 patent were invalid for obviousness.[3] Thus, the Federal Circuit had to affirm the denial of JMOL because "all reasonable [jurors] would . . . [not] draw an opposite conclusion" regarding the underlying factual bases supporting the jury's verdict. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931). Bann fundamentally misunderstands the law of JMOL as shown by its statement that "DyStar cannot have this Court,

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[1] Bann admits that certiorari may be granted if "the Federal Circuit overstepped its bounds and failed to follow the law." Resp. Br. at 7.

[2] In the alternative, DyStar respectfully requests the Court grant certiorari, vacate and remand, so that the Federal Circuit can properly apply *KSR* to the facts of this case.

[3] While obviousness is a matter of law, *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966), the underlying factual issues supporting a finding of obviousness or non-obviousness may not be disturbed if there is substantial evidence to support that finding. *Structural Rubber Products, Co. v. Park Rubber Co.*, 749 F.2d 707, 719 (Fed. Cir. 1984).

or the Federal Circuit, ignore [Bann's] evidence merely to justify the jury verdict." Resp. Br. at 10. This statement is flatly wrong and demonstrates that Bann believes that it is proper for the appellate court to simply weigh the evidence as if it was the fact-finder. The law is clear: if there is substantial evidence supporting the jury's verdict, contradictory evidence is irrelevant on appeal. *Basham v. Pennsylvania R. Co.*, 372 U.S. 699, 700-01 (1963).

Throughout its opposition, Bann simply points to evidence it prefers. Regarding a person of ordinary skill in the art, Bann selectively quotes testimony of DyStar's expert, Dr. Blackburn, regarding a person of ordinary skill.[4] Resp. Br. at 10. Bann fails to inform the Court that Dr. Blackburn ultimately concluded that a person of ordinary skill was a person who worked in a dyehouse, *i.e.*, a dyer. A497:22-24. In addition, the jury heard testimony from another expert who also stated that the person of ordinary skill in the art was a dyer. A235:25-A236:18. Thus, there was substantial evidence supporting the jury's finding, and Bann's alleged countervailing evidence is irrelevant.

Second, even if there was not substantial evidence supporting DyStar's definition of a person of ordinary skill in the art, the Federal Circuit still improperly reversed the denial of JMOL. Here, faced with a jury verdict, the Federal Circuit was required to draw all inferences in favor of DyStar, including the inference that the jury used the Bann/Federal Circuit definition of a person of ordinary skill in the art. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962) (all reasonable inferences must be drawn in favor of the jury verdict, "even though contrary inferences might reasonably be drawn"). Instead,

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[4] Bann cites to a part of the District Court record that was not before the Federal Circuit and, therefore, could not have been relied upon. Resp. Br. at 10 n.28; *id.* at 25 n.70.

the Federal Circuit explicitly and improperly inferred in Bann's favor that the jury did not use the Bann/Federal Circuit definition of a person of ordinary skill in the art. App. 12-13. As explained in DyStar's opening brief, there was substantial evidence to support the jury's verdict, even by using the Bann/Federal Circuit definition.[5]

Regarding the Brochet patent, DyStar's opening brief identified substantial evidence supporting the jury's verdict. Pet. Br. at 10-11. In opposition, Bann asks the Court to re-weigh evidence by implying that the Brochet patent is limited to indigo. Resp. Br. at 13. Not only is such a re-weighing improper, but Bann's argument is refuted by the plain language of the patent which also discusses other dyes. U.S. Patent 1,247,927, pg. 1, line 111- pg. 2, line 6.

Bann's argument regarding the Brochet article is also unavailing.[6] The jury heard expert testimony that the Brochet article confirmed that the indigo produced by the Brochet patent could not be used as a dye. A458:6-21; A461:14-A462:16. Rather than pointing to any evidence contradicting either the article or testimony, Bann concocts a "logic" game. But a game is not evidence. Nevertheless, the Federal Circuit improperly weighed this game "evidence" against the substantial evidence presented by DyStar.

Finally, Bann's argument regarding the *Colour Index* is flatly contradicted by its own brief. Bann states that it is a "*fact* that the Brochet patent is listed under a column in the

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[5] This is not a case where DyStar just presented evidence of the level of ordinary skill without more. DyStar also introduced substantial evidence at trial refuting the art cited by Bann for the very reason that the jury might (wrongly) use the Bann definition of ordinary skill.

[6] Mr. Brochet wrote this article after filing for his patent, but before the patent issued.

Colour Index which suggests that [the product of the Brochet patent] forms an 'unstable' solution and, thus, could not be used for dyeing."[7] Resp. Br. at 13 (emphasis added). That Bann realizes this "fact" proves that a reasonable jury could also have realized this fact.

Regarding the Wimmer patent, Bann does not dispute that its own expert witness conceded that the Wimmer indigo was placed on the market as an intermediate, not as a dye.[8] Pet. Br. at 12. Contrary to Bann's assertion, the Wimmer patent does not contain "plain language [that] says that [the product of the Wimmer patent] 'can be used for dyeing.'" Resp. Br. at 14. Rather, the quoted language is describing a prior art "solution," and it is at most an inference that the language also applies to the filtrate disclosed in the Wimmer patent.[9] Bann also argues that the comprehensive history of indigo development, written by Dr. Wimmer (the inventor of the Wimmer patent), is irrelevant. But that history described every facet of BASF's (Dr. Wimmer's employer) development and use of its indigo. This history shows that the only use ever made of his indigo was as an intermediate in the production of solid products.

Regarding Chaumat, Bann does not dispute that the jury received evidence that the Chaumat product could not be

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[7] Bann's argument that another patent listed in the same column as the Brochet patent may have been "ready for use in the dye-bath" (this alleged fact was disputed at trial) is irrelevant.

[8] Additionally, the jury heard expert testimony that the Wimmer patent would not make a stable indigo dye. A528:5-23.

[9] The jury received evidence that showed that in the early twentieth century the word "solution" did not necessarily have the same meaning as in the '992 patent. *See*, *infra*, 5 fn.10. Moreover, there was no evidence introduced at trial that "filtrate" is even a solution under the early twentieth century definition, let alone under the '992 definition.

used as a dye because Chaumat's method would not reduce indigo. *See* Pet. Br. at 12. Instead, Bann argues that Chaumat must teach how to reduce indigo because the patent states the indigo "may be prepared on the spot and be used at once for dyeing." Resp. Br. at 15. While the jury had substantial evidence to the contrary, even if the statement were correct, it is irrelevant because it was undisputed that preparing indigo dye on the spot and using it at once for dyeing was the prior art method. A204:1-A208:13.

That Chaumat stated his product could be stored "in a closed vessel" does not make the claims of the '992 patent obvious. Assuming, *arguendo*, that the Chaumat indigo was reduced, the jury heard testimony from both parties' experts and a fact witness that any attempt to retrieve the indigo from the air-tight vessel would lead to the immediate oxidation of the indigo. A415:6-15; A313:14-A314:1; A1049:11-21. Oxidized indigo can not be used for dyeing.

Accordingly, there was substantial evidence supporting the jury's verdict that Brochet, Wimmer and Chaumat, alone or in combination, do not render the asserted claims of the '992 patent obvious.

Finally, Bann's "real world" evidence was rejected by the jury. Bann argued that, using the prior art, it had produced an aqueous solution of leuco indigo prepared by catalytic hydrogenation and sold it to a dyehouse, which used it to dye. That argument is false. The attempt to dye with Bann's indigo failed miserably, as testified to by *Bann's witnesses*.[10] A847:17-A848:16; A967:6-20.

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[10] Bann's additional "facts" add nothing. *See* Resp. Br. at 24-26. For example, a 1936 manual refers to "Indigo Solution BASF 20%." Although called a solution, it was a colloidal suspension. A2646. In the early twentieth century, it was common to use the word "solution" to refer to products that were not actually solutions. A524:4-17.

II. SECONDARY CONSIDERATIONS AND THE NEW "CAPABILITY" STANDARD

The jury heard substantial evidence of praise for the invention, copying and unexpected results. Not only did the Federal Circuit disregard this evidence, it completely ignored these objective indicia of non-obviousness. Additionally, the Federal Circuit minimized or ignored DyStar's substantial and often unrebutted evidence supporting other secondary considerations (long-felt need, commercial success, failure of others, and skepticism of others).

Realizing that the Federal Circuit improperly disregarded the *Graham* factors, Bann questions the strength of the evidence of secondary considerations and argues that such evidence is irrelevant. As for its first argument, Bann offered *no* evidence rebutting DyStar's evidence for skepticism, praise for the invention (Bann ignored that even it praised the invention), unexpected results and failure of others.[11] Instead, Bann resorts to a barely disguised circular argument that because the invention is allegedly obvious, those four factors are irrelevant. Resp. Br. at 17-18.

Bann also argues that it could not have copied the invention because Bann "developed its own indigo solution in 1987." *Id.* at 17. But the evidence shows that the alleged 1987 indigo solution *did not work* as a dye. *See*, *supra*, at 5.

Regarding commercial success, Bann ignores what the Federal Circuit referred to as "considerable commercial success from the introduction of its product." App. 29.

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[11] Responding to DyStar's evidence of Buffalo Color's 1979 failure, Bann argues that Buffalo Color did not fail because "in 1994 and 1996" (which is after the critical date), Bann sold indigo dye to Buffalo Color. Resp. Br. at 18. Whether Bann sold dye to Buffalo Color in the mid-1990s is *irrelevant* to the fact that DyStar proved that Buffalo Color failed to make pre-reduced indigo solution suitable for dyeing in 1979.

Instead, it argues that 60% of DyStar's customers do not purchase the indigo solution. Resp. Br. at 19. But it ignores the fact that the mills that use the claimed process produce the *vast majority* of the denim made in this country. A893:25-A895:5; A403:7-10.

Regarding long-felt need, Bann admits that two dyehouses were trying, in the early 1990s, to solve the problem solved by the claimed invention (evidence that the claimed invention was not obvious). Bann fails to point out, however, that the jury heard from Bann's own expert that other dyehouses were also trying to solve this problem. A1141:19-A1143:9. Further, Buffalo Color tried to solve these problems in the 1970s and failed. Thus, there is substantial evidence of long-felt need.

Realizing that it cannot refute DyStar's evidence that the objective indicia of non-obviousness demonstrate that the claims of the '992 patent are not obvious, Bann argues "secondary considerations *should be irrelevant* to the analysis."[12] Resp. Br. at 20 (emphasis added). Although flatly incorrect, that is what the Federal Circuit did here. While the Federal Circuit did mention some of the substantial evidence regarding secondary considerations, it treated that evidence as irrelevant and created a new "capability" standard for evaluating obviousness. *See* App. 23.

The Federal Circuit is right in one respect: under its new capability standard, evidence of secondary considerations *is*

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[12] Bann attempts to fit this case into the factual framework of *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007). But the relevance of *KSR* is that it reaffirms the importance of the *Graham* factors, including secondary considerations. These *Graham* factors are factual issues to be determined by the jury. *Graham*, 383 U.S. at 17.

irrelevant. But ignoring secondary considerations violates the Court's *Graham* precedent.[13] That new capability standard also violates *Goodyear Tire & Rubber Co., Inc. v. Ray-O-Vac Co.*, 321 U.S. 275 (1944), because patents may no longer be granted 1) if they "should have been obvious to those who worked in the field," and 2) for simple inventions. *Id.* at 279.

Bann does not dispute these points, it simply ignores them and argues that the Federal Circuit was merely clarifying three earlier cases "which highlighted and characterized what the court was saying." Resp. Br. at 20. But none of those cases even mention the word "capability," or any derivation thereof. Consequently, the Federal Circuit created its new "capability" standard out of whole cloth, in an attempt to rescue its obviousness jurisprudence in light of the then-pending *KSR* case. Accordingly, DyStar's argument that the Federal Circuit's new capability standard violates the Court's precedent for three reasons stands unrebutted.

In addition, the new capability standard now violates the Court's precedent for a fourth reason. Bann argues that the Federal Circuit's decision was correct because "every element of the '992 patent was already known long before the '992 patent was ever filed." Resp. Br. at 23. Assuming *arguendo*, that Bann's statement is accurate, that is still an insufficient basis to find a claim obvious because "claimed discoveries almost of necessity will be combinations of what, in some sense, is already known." *KSR*, 127 S. Ct. at 722. Rather, KSR held that an invention is only obvious if the

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[13] Indeed, not only are secondary considerations now irrelevant, but they actually work against a finding of obviousness. For example, under the Federal Circuit's new standard, if an invention is commercially successful, that just increases the motivation to combine, making the only relevant factor whether the invention is within the capability of an ordinary artisan.

invention "would [have] occur[ed] in the ordinary course." *Id.*

Here, there was substantial evidence, including the fact that nearly 80 years elapsed before the previous elements were combined, to support the jury's verdict that this invention would not have occurred in the "ordinary course." But the Federal Circuit ignored that evidence, because under its capability test it is irrelevant whether an invention would have occurred in the "ordinary course." Therefore, this case violates *KSR*, and the Court should grant the petition for certiorari to decide this case. In the alternative, DyStar respectfully requests the Court to grant certiorari, vacate and remand, so that the Federal Circuit can properly apply *KSR* to the facts of this case.

III. CORROBORATION

Bann admits that the Federal Circuit "characterize[d] the inventor's testimony" as "undocumented." Resp. Br. at 21. Bann argues, however, that the Federal Circuit did not really mean that the testimony needed to be documented. "Instead, the Federal Circuit was merely suggesting that more explanation was needed from *the inventor's mouth* as to why the co-workers were skeptical." *Id.* at 22 (emphasis added). But Bann does not and can not explain how more "explanation . . . from the inventor's mouth" would be "documented."

Bann further argues that there is no new corroboration requirement, but rather that the Federal Circuit was "concern[ed] that DyStar did not put on enough . . . evidence in order to prove the existence of skepticism." *Id.* There are two reasons why that argument is wrong. First, throughout the opinion, the Federal Circuit was not reticent to explicitly express its "concerns" that there was not substantial evidence, but it expressed no such "concerns" here. Second,

if a witness testifies under oath that a fact is true, and the jury believes the witness, it is improper for an appellate court to have "concerns" about the truth of the testified fact.

Bann attempts to justify the Federal Circuit's new rule by stating that "The Federal Circuit was looking for a comparison of the inventive compound with old products." But it is not the Federal Circuit's job to look for additional evidence to decide whether a witness's testimony is credible. The Federal Circuit simply does not trust juries to decide whether a witness is credible. When it does not agree with the jury's verdict, it either substitutes its opinion of the evidence for the jury's (*see*, *supra*, Part I) or it establishes new procedural rules, such as its new corroboration requirement to prevent juries from deciding credibility.

Finally, Bann focuses on the fact that the Federal Circuit complained that the evidence of skepticism was a "bare assertion." That complaint is both wrong and irrelevant. It is wrong because there was much more than a "bare assertion" that others were skeptical. Pet. Br. at 24. It is irrelevant because witness testimony is regularly nothing more than a "bare assertion," *e.g.*, "the light was green." In every circuit but the Federal Circuit, it is the jury's prerogative to decide whether a "bare assertion" is credible. Thus, the Federal Circuit's new rule that testimony that is a "bare assertion" or "undocumented" can not be relied on by the jury is in direct conflict with its sister circuits. The Court should grant the petition to resolve this conflict.

CONCLUSION

For the foregoing reasons, together with the reasons stated in its opening brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

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